

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Charlie Hartford	Team: Squad #8	CCRB Case #: 201904181	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input checked="" type="checkbox"/> Injury
Incident Date(s) Monday, 05/06/2019 9:30 AM	Location of Incident: § 87(2)(b)	Precinct: 94	18 Mo. SOL 11/6/2020	EO SOL 6/23/2021	
Date/Time CV Reported Mon, 05/06/2019 1:50 PM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 05/13/2019 11:18 AM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Witness(es)	Home Address
§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Robert Ferguson	10953	897444	094 PCT
2. POM Khyume Khan	28822	927025	094 PCT
3. LT Gregory Rivera	00000	942437	094 PCT
4. An officer			094 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Robert Ferguson	Force: Police Officer Robert Ferguson used physical force against § 87(2)(b)	§ 87(2)(b)
B.LT Gregory Rivera	Force: Lieutenant Gregory Rivera used physical force against § 87(2)(b)	§ 87(2)(b)
C.POM Khyume Khan	Force: Police Officer Khyume Khan used physical force against § 87(2)(b)	§ 87(2)(b)
D.LT Gregory Rivera	Discourtesy: Lieutenant Gregory Rivera spoke discourteously to § 87(2)(b)	§ 87(2)(b)
E.LT Gregory Rivera	Force: Lieutenant Gregory Rivera used a Taser against § 87(2)(b)	§ 87(2)(b)
F.LT Gregory Rivera	Force: Lieutenant Gregory Rivera used a taser against § 87(2)(b)	§ 87(2)(b)
G.LT Gregory Rivera	Abuse: Lieutenant Gregory Rivera arrested § 87(2)(b)	§ 87(2)(b)
H. An officer	Abuse: An officer deleted information on § 87(2)(b)'s electronic device.	§ 87(2)(b)

### Case Summary

On May 6, 2019, Lieutenant Gregory Rivera of the 94<sup>th</sup> Precinct reported this incident to IAB. On May 13, 2019, this case was received by the CCRB.

On May 6, 2019, at approximately 9:30 a.m., at § 87(2)(b) in Brooklyn, Police Officer Robert Ferguson of the 94<sup>th</sup> Precinct used physical force against § 87(2)(b) (Allegation A: Force, § 87(2)(g)). Lieutenant Rivera and Police Officer Khyume Khan of the 94<sup>th</sup> Precinct used physical force against § 87(2)(b) (Allegations B and C: Force, § 87(2)(g)). Lieutenant Rivera spoke discourteously to § 87(2)(b) (Allegation D: Discourtesy, § 87(2)(g)). Lt. Rivera deployed a Taser against § 87(2)(b) (Allegation E: Force, § 87(2)(g)). Lt. Rivera used a Taser a second time against § 87(2)(b) (Allegation F: Force, § 87(2)(g)). Lt. Rivera arrested § 87(2)(b) (Allegation G: Abuse of Authority, § 87(2)(g)). An officer allegedly deleted information on § 87(2)(b)'s phone (Allegation H: Abuse of Authority, § 87(2)(g)).

This case contains body-worn camera footage, as well as surveillance footage obtained from § 87(2)(b) (Board Review 04, 16-31 and 50-59).

### Findings and Analysis

**Allegation (A) Force: Police Officer Robert Ferguson used physical force against § 87(2)(b)**

**Allegation (B) Force: Lieutenant Gregory Rivera used physical force against § 87(2)(b)**

**Allegation (C) Force: Police Officer Khyume Khan used physical force against § 87(2)(b)**

It is undisputed that at 8:47 a.m. on May 6, 2019, the staff of § 87(2)(b), a residential building in Brooklyn, called 911 requesting that officers remove a crying female individual from the lobby. The female individual, who identified herself as § 87(2)(b) alleged to the responding officers, PO Kahn and PO Ferguson, that an individual in Apartment § 87(2)(b) hit her in the face and pointed a gun to her head. PO Kahn and PO Ferguson went upstairs and spoke to the individual inside the apartment, identified as § 87(2)(b). § 87(2)(b) denied having a gun and claimed that he had asked § 87(2)(b) to leave after she had demanded money for sex and threatened to make false accusations to the police. The officers went downstairs, where they met with Lieutenant Rivera. Lieutenant Rivera instructed PO Kahn and PO Ferguson to accompany him back upstairs, stating that if there was a firearm in the apartment § 87(2)(b) would attempt to discard it. The officers then went back upstairs and encountered § 87(2)(b).

In his CCRB interview on July 9, 2019, § 87(2)(b) stated that after PO Ferguson and PO Kahn went downstairs, he quickly attempted to clean his apartment and dispose of a jar of cocaine which § 87(2)(b) had left behind (Board Review 01). § 87(2)(b) opened his apartment door and encountered PO Kahn, PO Ferguson, and Lieutenant Rivera. Lieutenant Rivera told § 87(2)(b) he was being detained, and PO Kahn placed a handcuff on one of § 87(2)(b)'s wrists. The officers then began punching § 87(2)(b) from behind, despite him not resisting the officers. After tasing § 87(2)(b) an officer kicked § 87(2)(b) on his head, back and ribs after while he was on the ground.

During their CCRB interviews, Lieutenant Rivera and PO Kahn were consistent in testifying that upon going upstairs, they encountered § 87(2)(b) leaving a trash compactor room (Board Review 02 and 03). Lieutenant Rivera and PO Kahn had no additional information about the alleged firearm at this point. After telling § 87(2)(b) he was being detained and placing one of his arms in handcuffs, § 87(2)(b) pulled away from the officers. The officers had no opportunity to frisk § 87(2)(b). Lieutenant Rivera, who had grabbed ahold of one of § 87(2)(b)'s hands, then pulled § 87(2)(b) to the ground. Lieutenant Rivera and PO Kahn both denied that any officer punched or kicked § 87(2)(b).

The investigation was unable to interview PO Ferguson due to him retiring from service (Board Review 36).

TRI paperwork prepared by Lieutenant Rivera, PO Kahn and PO Ferguson is consistent with Lieutenant Rivera and PO Kahn's CCRB testimony (Board Review 40).

Lieutenant Rivera's body-worn camera footage shows at 11:15 minutes that the officers encountered § 87(2)(b) leaving the trash compactor room, not his apartment as claimed by § 87(2)(b) (Board Review 17). The footage also shows § 87(2)(b) pulling away from the officers within the next ten seconds. The ensuing tumult causes both Lieutenant Rivera and PO Kahn's body-worn cameras to fall to the ground (Board Review 17 at 11:31 minutes and Board Review 19 at 00:10 minutes). The footage does not depict whether officers punched or kicked § 87(2)(b). PO Ferguson did not appear to activate his BWC until after § 87(2)(b) was apprehended (Board Review 20).

Surveillance footage obtained from § 87(2)(b) § 87(2)(b) does not depict the location where force was used against § 87(2)(b).

§ 87(2)(b)'s medical records from § 87(2)(b) on § 87(2)(b), as well as the Ambulance Call Report, note no complaints or diagnoses pertaining to the use of physical force, aside from pain to the area where § 87(2)(b) was tased (Board Review 32 and 08).

The Patrol Guide states that the primary duty of all members of service is to protect human life, including the lives of individuals being placed in police custody (Board Review 41). Reasonable force may be used to prevent escape from custody; however, members of service are instructed to use de-escalation techniques to gain voluntary compliance from subjects when appropriate. In determining whether force is reasonable, the Patrol Guide outlines numerous factors to be taken under consideration, including the nature and severity of the crime committed, the immediacy of the threat to members of service, whether the suspect has a violent history, whether the person is actively resisting being apprehended, and whether the person is attempting to evade arrest by flight.

Active resistance is defined by the Patrol Guide as including both physically evasive movements to defeat a member of service's attempt at control (Board Review 06).

The Patrol Guide outlines three levels of force, and delineates punches and kicks as falling under the first and least regulated category (Board Review 42).

§ 87(2)(g)

§ 87(2)(g)

**Allegation (D) Discourtesy: Lieutenant Gregory Rivera spoke discourteously to § 87(2)(b)**

It is undisputed that Lieutenant Rivera told § 87(2)(b) ““I’m gonna fucking tase you right now. I’m gonna fucking zap you.” Lieutenant Rivera makes these statements at 11:34 minutes in his BWC (Board Review 17).

Lt. Rivera testified in his CCRB interview that he made these statements in the context of a stressful situation (Board Review 03).

Patrol Guide Procedure 200-02 directs officers to treat civilians with courtesy and respect (Board Review 43).

In Disciplinary Case No. 2017-17005, the Deputy Commissioner of Trials noted that it has consistently held that “profane remarks, made during stressful situations or while an officer is trying to get a chaotic situation under control, are not misconduct” (Board Review 44).

§ 87(2)(g)

**Allegation (E) Force: Lieutenant Gregory Rivera used a Taser against § 87(2)(b)**

**Allegation (F) Force: Lieutenant Gregory Rivera used a Taser against § 87(2)(b)**

It is undisputed that Lieutenant Rivera used a Taser twice against § 87(2)(b)

In his CCRB statement, Lieutenant Rivera stated that after he warned § 87(2)(b) that he was going to use his Taser, § 87(2)(b) continued to resist by placing his arms underneath his body to avoid being handcuffed (Board Review 03). Lieutenant Rivera then discharged his Taser from either a standing or kneeling position well under five feet from § 87(2)(b). The Taser was ineffective due to the short distance between the darts, and § 87(2)(b) continued to resist in the same manner as before. Lieutenant Rivera then used the prongs of his Taser to create a third point of contact with § 87(2)(b)'s body and cycled the Taser for a second time.

PO Kahn's testimony was generally consistent with Lieutenant Rivera's, with the exception that PO Kahn only recalled Lieutenant Rivera using the Taser once against § 87(2)(b) (Board Review 02).

As noted in the discussion of Allegations A-C, body-worn camera footage does not visually depict the officers' attempts to place § 87(2)(b) in handcuffs. However, Lieutenant Rivera can be heard using a Taser against § 87(2)(b) at 11:54 minutes in his BWC (Board Review 17). Lieutenant Rivera is depicted telling § 87(2)(b) to put his hands behind his back, at which time § 87(2)(b) can be heard saying that he cannot move at 11:59 minutes. At 12:03 minutes, Lieutenant Rivera can be heard cycling the Taser a second time. Lieutenant Rivera voiced no recollection of § 87(2)(b) saying he could not move during his interview.

At 3:00 minutes in the initial call where he reported this incident to IAB, Lieutenant Rivera clearly describes making three points of contact with § 87(2)(b)'s body during both Taser cycles (Board Review 10). When confronted with the discrepancy during the CCRB interview, Lieutenant Rivera claimed that he misspoke to IAB.

Photographs taken of § 87(2)(b) for the TRI reports prepared for this incident confirm that the Taser darts impacted § 87(2)(b) such that what appears to be only a few inches separated each dart (Board Review 45).

Patrol Guide Procedure 221-01 states that force may be used when it is reasonable to place a person in custody (Board Review 41). Patrol Guide Procedure 221-08 classifies the use of a Taser as a "significant intermediate use of force option such as O.C. pepper spray or impact techniques," and states that a Taser should be used to "provide a greater margin of safety for MOS who might otherwise be forced to physically subdue a dangerous subject" (Board Review 05). Patrol Guide Procedure 221-02 instructs officers to consider whether a subject's lack of compliance is deliberate, as opposed to being caused by a "physical limitation" or other factor (Board Review 06).

Axon's Taser documentation for law enforcement warns officers to avoid creating multiple completed Taser circuits without justification (Board Review 46).

§ 87(2)(g)  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

§ 87(2)(g)  
[REDACTED]  
[REDACTED]  
[REDACTED]

§ 87(2)(g)

**Allegation (G) Abuse of Authority: Lieutenant Gregory Rivera arrested § 87(2)(b)**

It is undisputed that Lieutenant Rivera arrested § 87(2)(b), § 87(2)(b)'s neighbor, solely because he believed § 87(2)(b) to be committing Obstruction of Governmental Administration.

During his CCRB interview, Lieutenant Rivera testified that he believed § 87(2)(b) to be obstructing governmental administration solely because he was “interfering” with the arrest by being “too close” (Board Review 03). Upon reviewing his BWC after the incident and conferring with “other people,” Lieutenant Rivera determined that there was “not enough” to charge § 87(2)(b) with and released him from the precinct stationhouse.

In his CCRB interview, PO Kahn voiced no knowledge of any indications that § 87(2)(b) was engaged in criminal activity, aside from Lieutenant Rivera ordering § 87(2)(b) to go back inside and § 87(2)(b) not doing so (Board Review 02).

The investigation was unable to obtain a statement from § 87(2)(b).

The arrest of § 87(2)(b) is depicted in Lieutenant Rivera’s body-worn camera footage (Board Review 17). Lieutenant Rivera first addresses § 87(2)(b) at 16:50 stating, “You want to take a picture of the found firearm so you can give it to your lawyer?” At this point, § 87(2)(b) has been in handcuffs for several minutes. Lieutenant Rivera approaches § 87(2)(b) stating, “Just go inside, you know what, you’re being detained.” When § 87(2)(b) asks why he is being detained, Lieutenant Rivera states, “Because you witnessed what’s going on and now you’re fighting with me. When I grab you, you don’t pull away from me.”

Later in his body-worn camera footage, at 22:48 minutes, Lieutenant Rivera tells § 87(2)(b) “The reason why you are under arrest is because you have evidence on your phone, I went to go talk to you and tell you to put your hands behind your back, you refused to do it. That’s obstruction of governmental administration.”

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act (NY CLS Penal § 195.05, Board Review 60).

In People v. Lupinacci, 191 A.D.2d 589, 595 N.Y.S.2d 76 (App. Div. 2nd Dept. 1993), the Supreme Court of New York, Appellate Division, Second Department held that a defendant may not be convicted of obstructing governmental administration unless the police were engaged in

authorized conduct (Board Review 61). Specifically, the Court in this case held that an individual who walked away from his arresting officer, ignored orders to stop, and struggled to avoid being handcuffed was not guilty of obstruction of governmental administration because officers did not have reasonable suspicion to stop the individual.

§ 87(2)(g)

**Allegation (H) Abuse of Authority: An officer deleted information on § 87(2)(b)'s electronic device.**

In his sworn statement, § 87(2)(b) relayed being informed by § 87(2)(b) that he had filmed the interaction on his cell phone, but that an officer had deleted it (Board Review 01). However, § 87(2)(b) is depicted on body-worn camera footage informing officers that he did not, in fact, record any footage (Board Review 20 at 10:38 minutes).

As noted above, the investigation was unable to obtain a statement from § 87(2)(b). Both PO Kahn and Lieutenant Rivera denied that any officer deleted footage from § 87(2)(b)'s phone (Board Reviews 02 and 03).

§ 87(2)(g)

**Civilian and Officer CCRB Histories**

- This is both § 87(2)(b) and § 87(2)(b)'s first CCRB complaint (Board Review 37 and 47).
- Lieutenant Rivera has been a member of service for 14 years. He has been the subject of 20 allegations in 11 other cases, none of which were substantiated § 87(2)(g).
- PO Kahn has been a member of service for 19 years. He has been the subject of four allegations in three other cases, none of which were substantiated § 87(2)(g).
- Prior to his retirement, PO Ferguson was listed as the subject of two allegations in two other CCRB complaints, none of which were substantiated § 87(2)(g).

**Mediation, Civil and Criminal Histories**

- This case was not eligible for mediation.
- § 87(2)(b) has filed a Notice of Claim for \$5,000,000.00 regarding this incident (Board Review 48). According to the NYC Comptroller's Office, neither § 87(2)(b) nor

§ 87(2)(b) has filed a Notice of Claim regarding this incident as of February 21, 2020 (Board Review 49).

- § 87(2)(b) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- § 87(2)(b) [REDACTED]  
[REDACTED]

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Squad No.: 8

Investigator: Charlie Hartford Inv. Charlie Hartford 9/15/20  
Signature Print Title & Name Date

Squad Leader: \_\_\_\_\_  
Signature Print Title & Name Date

Reviewer: \_\_\_\_\_  
Signature Print Title & Name Date